

April 15, 2013

Barbara Stocking
2367 Pinturo Way
Rancho Cordova, CA 95670

Re: Your Request for Advice
Our File No. A-13-035

Dear Ms. Stocking:

This letter responds to your request for advice regarding the revolving door provisions of the Political Reform Act (the “Act”).¹ This letter is based on the facts presented. The Fair Political Practices Commission (the “Commission”) does not act as a finder of fact when it renders assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

Furthermore, we only advise on the provisions of the Act and not other ethics laws that may also apply to your questions. In this regard, we note Government Code Section 1090, which provides that an officer or employee may not make a contract in which he or she is financially interested, and Public Contract Code Section 10411, which places certain restrictions on former state employees participating in a contract with which the official was involved during his or her state service. We strongly suggest you seek legal advice from your agency’s counsel or the Attorney General’s Office on these issues.

QUESTION

Do the Act’s post-governmental employment provisions prohibit you, a former employee and retired annuitant of CalPERS, from working for a consultant one year after you left state employment, if, during your employment with CalPERS, you managed the consultant’s work that was performed under a consulting contract with CalPERS.

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

CONCLUSION

To the extent that you worked on creation, formation, application, drafting or awarding of a contract with an external consultant while at CalPERS, the permanent ban would prohibit you from working on the performance or implementation of the contract after leaving state service. However, it would not prohibit you from working on a new proceeding.

Under the one-year ban, you are prohibited, for a period of twelve months after you left CalPERS as a retired annuitant, from making an appearance or communication before CalPERS on behalf of your new employer if the appearance or communication is for the purpose of influencing any legislative or administrative action or any discretionary act involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property.

FACTS

You retired from CalPERS on April 13, 2012 as an Investment Officer II in the Real Assets Unit. After retiring, you returned to CalPERS as a retired annuitant in the same position. You have recently left your employment with the State and wish to work for a consultant who was under contract with CalPERS while you were employed by CalPERS.

While you were employed by CalPERS, the Real Assets Unit used three external consultants to assist with the monitoring of the portfolio. You were not involved in the initial selection of the consultants but later made recommendations regarding the renewal or discontinuance of their consulting contracts. As an employee of CalPERS, both your permanent position and retired annuitant position were designated positions in CalPERS' conflict-of-interest code.

Your Position Duty Statement indicates that, as an Investment Officer, you were responsible for managing and administering various investment programs for the Portfolio Management Group of the Real Assets Unit, including the following:

Investment Portfolio Responsibilities.

Monitor and manage assigned investment relationships consistent with an approved strategic plan; review all documents and agreements related to assigned investment portfolios; work with investment managers on agreements and amendments; assist in the day-to-day investment activities of investment portfolios; develop and present recommendations for consideration by the Portfolio Management Group managers and to the Real Estate Investment Committee.

Investment Oversight, Monitoring, Reporting and Risk Management.

Conduct research to measure, monitor, manage and assess risk exposures; oversee external managers; provide periodic reports to apprise Portfolio Manager, Senior Portfolio Manager and Senior Investment Officer of Real Assets of investment performance, non-compliance, appraisal issues and audit issues; work with and administer external consultants performing work in support of the portfolio, developing their scope of work, budgeted dollars and hours, controlling and directing their timeline and expenses and reviewing final deliverables; work with a support team to review and authorize payment of invoices; review and monitor statistical reports to identify data trends; provide periodic reporting of the investment portfolio; work with investment managers and internal and external auditors to resolve identified findings; and work with the appraisal team to schedule and assist with property appraisals.

Lead Responsibilities.

Be the lead on a group of portfolios that are assigned to lower level investment officers, direct and review their work and provide feedback to the Program Manager and the Senior Program Manager on their performance.

ANALYSIS

Public officials who have left state service are subject to two types of post-governmental employment provisions under the Act, colloquially known as the “revolving door” prohibitions.

The Permanent Ban

The “permanent ban” prohibits a former state employee from “switching sides” and participating, for compensation, in any specific proceeding involving the State of California or assisting others in the proceeding if the proceeding is one in which the former state employee participated while employed by the state. (See Sections 87401-87402; Regulation 18741.1.)

The permanent ban applies to any judicial, quasi-judicial, or other proceeding in which you participated while you served as a state administrative official. “‘Judicial, quasi-judicial or other proceeding’ means any proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties in any court or state administrative agency . . .” (Section 87400(c).)

“The permanent ban does not apply to a ‘new’ proceeding even in cases where the new proceeding is related to or grows out of a prior proceeding in which the official had participated. A ‘new’ proceeding not subject to the permanent ban typically involves different parties, a different subject matter, or different factual issues from those considered in previous proceedings.” (*Rist* Advice Letter, No. A-04-187; also see *Donovan* Advice Letter, No. I-03-119.) New contracts with the employee's former agency in which the former employee did

not participate are considered new proceedings. (*Leslie* Advice Letter, No. I-89-649.) A new contract is one that is based on new consideration and new terms, even if it involves the same parties. (*Ferber* Advice Letter, No. I-99-104; *Anderson* Advice Letter, No. A-98-159.) In addition, the application, drafting, and awarding of a contract, license, or approval is considered to be a proceeding separate from the monitoring and performance of the contract, license, or approval. (*Anderson, supra*; *Blonien* Advice Letter, No. A-89-463.)

Your duties at CalPERS, as set forth in your Position Duty Statement, can be generally summarized as managing investments relationships, managing people, (both employees and outside consultants), monitoring investments, monitoring risk exposure, reviewing documents, conducting research, providing reports and making recommendations. In addition, you made recommendations regarding the renewal or discontinuance of the contracts of three external consultants who assisted with monitoring the Real Assets Unit portfolio. You worked with and administered the external consultants, developed their scope of work, budgeted dollars and hours, controlled and directed their timeline and expenses and reviewed their final deliverables. The contracts with the external consultants are considered a “proceeding” under the Act’s permanent ban on switching sides in a judicial, quasi-judicial or other proceeding under Sections 87400 and 87401.

To the extent that you worked on creation, formation, application, drafting or awarding of a contract with an external consultant while at CalPERS, the permanent ban would prohibit you from working on the performance or implementation of the contract after leaving state service. However, it would not prohibit you from working on a new proceeding.

The One-Year Ban

The “one-year ban” prohibits a former state employee from making, for compensation, any formal or informal appearance, or making an oral or written communication, before his or her former agency for the purpose of influencing any legislative or administrative action or any discretionary act involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property. (See Section 87406; Regulation 18746.1.)

The one-year ban applies to any employee of a state administrative agency who held a position that is designated or should be designated in the agency’s conflict-of-interest code. (Section 87406(d)(1); Regulation 18746.1(a)(2).) The ban applies for twelve months from the date the employee leaves state office or employment, which is defined as the date the employee permanently leaves his or her governmental agency or takes a leave of absence. (See *Lowry* Advice Letter, No. I-08-053; Regulation 18746.1(b)(1) and (2).) When an employee returns to state employment as a retired annuitant in a position that is designated in the agency’s conflict-of-interest code, the one-year ban begins anew, upon permanently leaving the retired annuitant position.

While in effect, the one-year ban applies only when a former employee or official is being compensated for his or her appearances or communications before his or her former agency on behalf of any person as an agent, attorney, or representative of that person. (Regulation 18746.1(b)(3) and (4).)

An appearance or communication is for the “purpose of influencing” if it is made for the “principal purpose of supporting, promoting, influencing, modifying, opposing, delaying, or advancing the action or proceeding.” (Regulation 18746.2.) An appearance or communication includes, but is not limited to, conversing by telephone or in person, corresponding in writing or by electronic transmission, attending a meeting, and delivering or sending any communication. (*Ibid.*)

Finally, appearances and communications are prohibited only if they are before a state agency that the public official worked for or represented, or before a state agency whose budget, personnel, and other operations are subject to the control of a state agency the public official worked for or represented. (Regulation 18746.1(b)(6).)

Regulation 18746.2(b)(1)-(4) provides that appearances or communications are not restricted under the one-year ban if an individual:

- “(1) Participates as a panelist or formal speaker at a conference or similar public event for educational purposes or to disseminate research and the subject matter does not pertain to a specific action or proceeding;
- (2) Attends a general informational meeting, seminar, or similar event;
- (3) Requests information concerning any matter of public record; or
- (4) Communicates with the press.”

We have also advised that a former agency official may, without violating the one-year ban, draft proposals on a client’s behalf to be submitted to the agency so long as the former employee is not identified in connection with the client’s efforts to influence administrative action. (*Cook* Advice Letter, No. A-95-321; see also *Harrison* Advice Letter, No. A-92-289.) Similarly, a former agency official may use his or her expertise to advise clients on the procedural requirements, plans, or policies of the official’s former agency so long as the employee is not identified with the employer’s efforts to influence the agency. (*Perry* Advice Letter, No. A-94-004.)

Accordingly, for a period of twelve months from the date you left CalPERS as a retired annuitant, you are prohibited from making an appearance or communication before CalPERS on behalf of your employer or a client if the appearance or communication is for the purpose of influencing any administrative or legislative actions or any discretionary act involving the

issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property.

You may, however, draft proposals on your employer's or client's behalf and advise your employer or client on the procedural requirements, plans, or policies of CalPERS so long as you are not identified in connection with your employer's or client's efforts to influence administrative action.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Valentina Joyce
Counsel, Legal Division

VJ:jgl